understood by all concerned with its adoption or administration. There is simply no basis for the suggestion that the Court below erred in following the same course.*

III

The other specifications of error urged by petitioners do not raise questions of any general importance or of probable merit.

In addition to their major contention concerning the scope of the President's authority under Section 801 of the Act, discussed in Point II above, petitioners urge four other specifications of error. We shall show in this portion of the brief that none of these raises questions of any general importance or of probable merit.

1. Petitioners' contention that the action directed by the President went beyond the scope of the issues as framed by the Board (pp. 23-26).

No one has challenged the proposition of law, relied on by petitioners, that the Board and the President must act within the issues as framed. The question raised by petitioners is simply whether or not they did so on the facts of this case. This question is purely one of fact, not likely to recur.

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* At page 23, petitioners make a half-hearted argument to the effect that the President could not withdraw the approval initially given by him to the order of the Board disapproving the proposed transaction. This argument was made to the Court of Appeals and properly rejected by it (R. 101). We will not deal with it in this brief, however, since it is not listed by petitioners as a question presented, nor specified as an error, and therefore cannot be the basis for the issuance of a writ of certiorari (Rule XXXVIII (2)).

Happily, however, as will probably have already become apparent from the statement of the case, *supra*, pp. 2-9, petitioners' contention is patently without merit.

Admittedly the proceeding before the Board *began* as one involving only the transfer of AOA's certificate and assets to Pan American. However, at a very early stage Trans World and the Board's Public Counsel insisted on the Board's broadening the scope of the proceeding so as to give the President power to approve the merger on condition that suitable changes in the route pattern should be made, and prevailed upon the Board to make the necessary orders to that end (A 5-12 (Friendly affidavit, paras. 4-8)). Pursuant to the Board's order of March 1, 1949, broadening the scope of the proceeding, Pan American submitted a draft certificate providing for the addition of Paris and Rome as well as other points to Pan American's routes (A 12-14 (Friendly affidavit, para. 10)). Trans World requested an amendment of its certificate so as to give it access to London as well as to include Frankfurt "on a temporary basis related to needs during the period of American occupation of Germany" and many other route changes (A 14 (Friendly affidavit, para. 11). The requests of the two carriers thus embraced the very route changes which the President required.

Not only were the parties thus put on notice that these route changes were in issue, but substantial evidence was adduced in this regard. Pan American introduced a number of exhibits designed to show that under a system of competitive American-flag operation abroad, France and Italy deserved such competition; Trans World adduced evidence in favor of the route changes which it suggested; and Public Counsel presented evidence in favor of still other route changes (A 17-18 (Friendly affidavit, para.

14); RB 1957, 2520, 2831-60, 3855-66, 6129-52). At no point did counsel for petitioners, or any other counsel, object to the admission of this evidence. Petitioners' counsel did enter objection (which was overruled) to Pan American's exhibits supporting its application concerning the inclusion of Israel, but only on the ground that the *particular testimony* was not relevant to what he then characterized as "*the question of record*, namely, *whether Israel ought to be served by one or two carriers.*" (RB 1957; emphasis supplied.) If extension of Pan American service to Israel was a "question of record," as counsel correctly recognized, extension of its service to Paris and Rome was equally so.

Subsequent to the hearing, petitioners' counsel again recognized the fact that route changes were very much in issue. They excepted "to the Examiners' conclusion that this transaction should be approved without any conditions involving route changes" (RB 8996), and complained to the Board, in their brief on exceptions, that the Examiner's failure to consider what route changes should be made (RB 9126):

> "placed the Board, contrary to its express instructions, in a difficult position. The Board is in no position to consider what changes should be made in the North Atlantic route pattern as a condition of the approval of this transaction."

In short, petitioners knew, as did every other party to the proceeding, that route changes of the type actually made were very much in issue. The Board had stated in its opinion and order of May 19, 1949 (Serial No. E 2833):

> "We believe that the Board and the President should be free to consider any and all the points in

> the certificates of the transatlantic carriers in deciding whether route changes are required as a condition of approval of the transfer agreement, and the extent of such changes." (R. 163)

Petitioners' claim that "the question as to these new routes given by the President to PAA was never *truly* put in issue by PAA" (p. 25), whatever this may mean, is as pure afterthought as their new illumination on the meaning of Section 801.

In their attempt to avoid all this, petitioners torture a few isolated sentences in Board order Serial No. E 2833. When the Board's opinion is read in context (R. 158-165), it becomes apparent that the Board's reference to "new or different services" was to services by new carriers or services wholly different from anything theretofore rendered, and that the Board meant to reserve to itself and the President the power to make any and all changes in the certificates of the two carriers remaining after the merger which would be necessary "to arrive at a proper competitive balance." The changes directed by the President which, as stated by him, were designed to create American-flag competition in the four leading European traffic centers, came precisely within the objective so announced. The decision in *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F. 2d 777 (Ct. App. D. C. 1949), cited by petitioners (p. 25), was merely that the Board was not required to consolidate in the *North Atlantic Route Transfer* case an application by an "irregular" carrier, Seaboard & Western, for a certificate authorizing the carriage of cargo. The Court said that such consolidation would have been required only in an "area case" where the Board was considering the issuance of new certificates, and not where the Board and the Presi-

dent were merely considering whether or not approval of a merger should be conditioned upon changes in the routes of carriers already certificated to serve the area. Nothing more than this was done, and Seaboard & Western has not complained.

2. Petitioners' contention that Order Serial No. E 4410 was not validly adopted by the Board (pp. 27-28).

Petitioners' contention is that although the Board, at a meeting on July 10, 1950, directed the preparation of an order to carry out the President's instructions and further directed that, when prepared, the order should be submitted to the individual members of the Board for initialling, and although the order was so prepared and initialled by a quorum prior to its submission to the President, this still did not constitute "an order of the Board" since, as alleged by petitioners, the Board did not again meet on July 11 to "adopt" the order thus prepared and initialled.

Surely what was done by the Board in this case must be an altogether routine method, used every day by administrative agencies and, indeed, by many appellate courts. There was initial deliberation and decision as a Board. There was every opportunity for further consultation and deliberation. If any of the Board members had any question whether the order as drafted reflected the instructions of the Board, it would have been the simplest thing to raise that question. No purpose would have been served by their meeting again to go through a mere formality. The cases relied on by petitioners are not in point. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950), does not even relate to the question raised by petitioners, and in none of the other cases was the questioned decision made by the governing body in meeting as a body.

3. Petitioners' contention that the Court of Appeals failed to consider the two contentions just discussed because, as petitioners assume, the Court had concluded that petitioners had no standing (pp. 28-31).

Petitioners' assumption as to the views entertained by the Court below with respect to their standing is wholly gratuitous. The Court of Appeals gave petitioners' counsel a full hearing, permitted him to submit a brief, and entertained his petition for reconsideration. Petitioners' alleged representative character was stressed in their papers (R. 20-21) and was thus fully before the Court of Appeals, although the names of the persons alleged to be so represented were not disclosed either to the Court or to the interveners.

Petitioners base their assumption on the fact that the Court below did not specifically discuss in its opinion the two contentions just analyzed, which petitioners had advanced below although their fellow petitioner, Trans World, had not thought it worth while to do so. This argument rests on an inarticulate major premise which is wholly unfounded, namely, that an appellate court must deal expressly in an opinion with each and every argument advanced by a petitioner with standing, however unmeritorious the argument may be. However, if there were ground for petitioners' assumption, this still would afford no basis for the granting of a writ of certiorari. For the contentions in question are, as has been shown, without merit; and if the Court of Appeals had in fact determined that petitioners were without standing, it would have been correct in this determination, for reasons pointed out in Point I of this brief.

4. Petitioners' contention that the Court of Appeals "held" that, since the transfer of AOA's certificate to Pan American required the approval of the President, his approval was also required for the transfer of AOA's assets (pp. 31-32).

This final argument of petitioners relies on a "holding" which was never made.

In considering this argument, it is to be assumed, as the President and the Board believed on July 10, 1950, and as the Court of Appeals has correctly held, that the President had the power, under Section 801 of the Civil Aeronautics Act, to direct the Board to grant the application for the transfer of AOA's certificate.

The Board was thereupon obliged to consider whether to grant or withhold its approval, under Section 408 of the Act, to the transfer of AOA's physical assets to Pan American in the light of the President's directive as to the transfer of AOA's certificate. The Board specifically found that, in the situation which had arisen, "the transfer of AOA's assets should be approved under section 408 of the Act" (R. 149). No one was contending or indeed could reasonably contend, that if AOA's operating authority was to be transferred to Pan American, its physical assets should not be. All real question as to the fairness of the purchase price had been removed by a modification of the original contract made by the parties in September, 1949, and petitioners conceded that the price was reasonable (*supra,* p. 16). Labor protective conditions, the only other issue relating to the terms of the acquisition which had ever been litigated, were reserved for subsequent determination by the Board, and petitioners do not complain of what the Board later did.

Neither the Board, the President, nor the Court of Appeals, therefore, has ever held what petitioners say they have held. All that has been held is that when the President has properly exercised his authority under Section 801 to direct the transfer of a certificate to engage in international air transportation, the Board may appropriately exercise its powers under Section 408 with respect to the acquisition of assets in the light of the President's lawful directive. This is merely applying the rule laid down by this Court in the *Waterman* case that the various sections of the Civil Aeronautics Act (in that case Sections 1006(a) and 801) must be read together so as to produce a harmonious result. *Pan American Airways Co.* v. *Civil Aeronautics Board,* 121 F. 2d 801 (2nd Cir. 1941), cited by petitioners (p. 32), which held that a Board decision approving the acquisition of a controlling stock interest in an air carrier engaged in international air transportation was not subject to Presidential approval, is completely inapposite.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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